

Supporting litigants in person in the family court

Robert Hush, *Consultant solicitor with Beck Fitzgerald Lawyers and Consultants, London and Senior Lecturer in Law with London South Bank University*

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') withdrew legal aid for most family law cases. Investment in mediation has not yet provided assistance to as many families as originally intended. The number of children applications to the family court is increasing and at a time when court resources are being reduced. This article considers a pilot scheme by students at London South Bank University in 2016/2017 to provide assistance and support to litigants in person in the family court and how similar projects might be developed in the future.

Background

The LASPO took most civil and private law children and family cases out of scope for legal aid in England and Wales from 1 April 2013. Ministry of Justice reports confirm that there has been a significant fall in the amount of family legal aid work. As local firms give up legal aid work, individuals are finding it more difficult to identify and access the services of lawyers practicing in family law.

The number of cases of domestic abuse related crimes rose 31% between 2013 and 2015, from 269,700 in the year to August 2013, to 353,100 in the year to March 2015 (Increasingly everyone's business: A progress report on the police response to domestic abuse, Her Majesty's Inspectorate of Constabulary, December 2015). And the situation is getting worse.

'In England and Wales, there is an unrelenting and increasing demand for the police to respond to incidents of domestic abuse. The total number of reported domestic abuse crimes has increased from 353,063 in the 12

months to March 2015, to 434,095 in the 12 months to June 2016.'

(*A progress report on the police response to domestic abuse*, Her Majesty's Inspectorate of Constabulary Fire & Rescue Services, November 2017)

This is an increase of 61% in domestic abuse related crimes. A significant increase for police constabularies that have seen a significant reduction in their funding.

To replace the lost legal aid, the government provided some funding to stimulate growth in mediation, but this has not materialised. Statistics reveal a sharp fall in numbers seeking mediation once the provision of legal aid had been withdrawn. In 2015, the Ministry of Justice published quantitative research, (*Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes*, Hamlyn, Coleman, Sefton, 2015) which revealed that that in the year following the LASPO, the number of publicly funded MIAMs in private children cases fell from 30,662 to 13,354 and the number of mediations from fell from 13,609 to 8,400.

Anne Barlow explains that,

'Post-LASPO, the policy aimed at encouraging more couples jointly to exercise their autonomy to mediate family disputes has had unintended consequences, with those eligible for legal aid attending the mandatory Mediation Information and Assessment Meetings falling by 60% and the number attempting mediation reducing by half. At present, the alternative route being chosen is self-representation in court, with the number of private family

law cases taken to court by ‘Litigants in Person’ having increased by 30%.’

(Barlow, Rising to the post-LASPO challenge: How should mediation respond? [2017] Journal of Social Welfare and Family Law)

On 10 December 2018, the BBC reported that its Shared Data Unit had analysed Ministry of Justice and Legal Aid Agency data since 2011/2012. The analysis revealed that around a million fewer claims for legal aid were being processed each year and that more than 1,000 fewer legal aid providers were paid for civil legal aid work than in 2011/2012. The research also revealed that:

‘This has prompted a more than five-fold rise in people representing themselves in court. Volunteers at the Personal Support Unit helped around 65,000 of them last year. Six years ago it was fewer than 10,000’.

The Personal Support Unit reports that it has assisted LIPs in 28,691 children law cases, out of a total of 36,141 family cases (Report and financial statements for the year ended 31 March 2018, Personal Support Unit, 2018).

The effects of LASPO upon the court system are far reaching. At a time when resourcing of the courts has been reduced, the number of children cases coming before the courts has increased. Cases without lawyers require more time in court. Court staff and judges are required to process more cases with fewer resources, putting at risk the court’s ability to justly resolve disputes. In ‘ALC Conference: “Crisis, what crisis?”’ January [2019] Fam Law 28, Sir Andrew McFarlane, President of the Family Division, described how one Designated Family Judge had informed him that the workload and the pressure were ‘remorseless and relentless’. Remarking of the increase from 2014 to 2016 of care cases of just under a third, the President went on to express his concerns and those of his predecessor:

‘In 2016 . . . Sir James Munby, rightly drew public attention to the inability of the court system to sustain the prompt

and timely determination of these cases and, in doing so, he asked for help. Sir James said:

“We are facing a crisis and, truth be told, we have no very clear strategy for meeting the crisis.”

Since then, the number of private cases brought by parents in dispute over the arrangements for their children has risen by a similar percentage which, in turn, has added to the significant and unprecedented volume of children cases that need to be heard and determined by the Family Court.’

The litigant in person

The Family Procedure Rules 2010, Practice Direction 12B, Annex, Explanation of Terms, describes litigant in person (‘LIP’) as ‘the name given to a person in court proceedings who does not have a lawyer’. This term is preferred to the American alternative description of the self-representing litigant. Research commissioned by the Ministry of Justice in 2014, reveals a complex picture. The introduction to *Litigants in Person in Private Family Court Cases*, by L Trinder, R Hunter, E Hitchings et al, 2014, explains that:

‘Litigants who represent themselves at court are referred to in this report as litigants in person (LIPs). “Partial representation” refers to litigants who had legal assistance at some stage in the court process but not throughout. Cases where both parties were represented at court are termed “fully represented”. Semi-represented refers to cases where one party was represented, one was in person. Non-represented cases are those where neither party was represented’.

Some additional funding to support LIPs has been made available to the Personal Support Unit (‘PSU’), which has grown considerably from its origins at the Royal Courts of Justice in London to most courts across the capital and in other major cities. The PSU offers a court-based McKenzie Friend Service and has in recent years recruited students to its team of volunteers.

Other initiatives exist. In 2014, Lucy Yeatman, then with Greenwich University, provided a student McKenzie Friend service based at East London Family Court and there are other student services in England and Wales. But the provision of free legal services at court for LIPs is not without considerable difficulties. Law Society guidance to the profession sets out the difficulties faced by solicitors providing pro bono services with limited resources in a court setting, as they are bound by professional conduct rules, requiring the comprehensive recording of instructions, advice and conversations with opponents and third parties, conflict checks and professional insurance cover (*Practice Note, Court Duty Scheme for Private Family Law* [2015] The Law Society).

Faced with such a complex and overwhelming problem, some have looked to California for inspiration.

Californian experience

In 2006 the Access to Justice Working Group appointed by the Californian State Bar produced its report, which revealed that 75% of citizen's legal needs were not being met (*And Justice For All: Fulfilling the Promise of Access to Civil Justice in California*, [2006] Californian State Bar). The Working Group found that the lack of legal services 'has a negative effect on the functioning of the judicial system', noting that 'Courts must cope with the need to provide guidance and assistance to proper parties to ensure a fair trial or hearing', resulting in 'a burden on both the court's time and personnel'.

In May 2015 the Judicial Council of California set out a detailed account of the steps that had been taken to support litigants in person in the preceding years (*Programs for Self-Represented Litigants*, [2015] Judicial Council of California). It describes a pluralist approach to the support of litigants in person:

- 'Self-help Centers' are located in the courts and are staffed by lawyers and others under supervision to provide

information and education to litigants in person about the justice process.

- 'Family Law Information Centers' have been piloted by the Judicial Council in three county Superior Courts. The centres are supervised by lawyers and assist low-income litigants in person with forms and information in family law.
- 'Model self-help Centers' have piloted new methods of providing services, including the application of technology. Services and materials developed by the model centres have been replicated across the other self-help centres.
- 'JusticeCorps', are made up of undergraduate students who undergo training in family law, small claims, and housing law before being placed in legal self-help centres to provide legal information to litigants in person under the direction of lawyers.

The state of California has developed a website to provide information for litigants in person and standardised most applications which can be completed on line to produce a document which can be printed and then filed with the court. The Justice Council has created videos to explain basic legal issues and court processes and are imbedded in to the website support. The state's website provides a facility for the regular updating of information to assist the courts and various agencies to provide assistance to litigants in person. The Judicial Council and the Legal Aid Association of California also provide an annual conference on self-help and family law. Education and training is provided by the Justice Council to court staff, judges, and community providers, to learn about meeting the needs of litigants in person.

All of this is underpinned by an Equal Access Fund where the Justice Council and state bar provide over \$1.5m to fund legal services programs and court-based services for low-income litigants in person.

London South Bank University Family Court LIP Service 2017

In about 2014, Lucy Yeatman developed a project where Greenwich University students

provided a McKenzie Friend service to litigants in person who attended at East London Family Court without a lawyer. The project has been extremely successful and continues today. Inspired by that project, a similar service was piloted by students at London South Bank University ('LSBU') at the Central Family Court in London from December 2016 until February 2017.

The project avoided the provision of legal advice. This is crucial because it relieves the burden of regulatory obligations that would otherwise apply to lawyers supervising the students' work. It also enables the service to be offered to both parties to the same case. The students provided support services for litigants in person attending in Children Act 1989 cases at the First Hearing Dispute Resolution Appointment ('FHDRA') under the general supervision of a senior lecturer, who was also a qualified and practicing family law solicitor. The project was designed to work alongside the Personal Support Unit and Citizen's Advice Bureaux, both of which were already established there.

The organisations were situated on the fourth floor of the court building, which had been set aside to facilitate the court's work with the Child Arrangements Programme. The court accommodated three dedicated courts to manage FHDRA on Wednesday each week. Her Majesty's Court & Tribunal Service ('HMCTS') provided a room on the fourth floor to accommodate the LSBU project and this provided a hub for supervision and mentoring and a space for equipment. Volunteers for the LSBU project were recruited from a body of students who had chosen family law as part of their study for university's LLB Law degree. They were selected from the second and third years of study at undergraduate level.

The student population at LSBU is a diverse one. Of the nine volunteers, two originated from non-UK EU countries. Of the seven UK students, three were from ethnic minority groups. Two were mature students and parents themselves. Generally the students shared similar ages and cultural

interests of the people that they were helping. And significantly, they shared an interest in family law. They possessed legal education and training. They were motivated and keen and aspired to the role of helping others in a legal environment. The project was supervised by a family law solicitor, but the students took responsibility for their work and those that they helped. They took responsibility for the management of the project and revision and development of a key template document, which was reworked over time at their suggestion. The project benefited from their education and enthusiasm and their education and enthusiasm was sustained by their experience of working in the project.

After selection, students were trained over 3 days. The first day of training considered the litigant in person and their needs and significant principles of conduct, such as confidentiality and safeguarding. It also considered other key principles of the Children Act 1989 and the significance of domestic abuse in children cases.

The second day considered the key objectives of the Family Procedure Rules 2010 and the Child Arrangements Programme and Practice Direction 12B, focusing particularly on the function of the FHDRA. Specific training was given for the provision of services to the litigants in person, noting *Litigants in Person: Guidelines for Lawyers* (Bar Council, CILEx and Law Society of England & Wales, 2015), the *Family Law Protocol* (4th edition, Law Society of England & Wales, 2015), and the use of standardised documents and procedures, designed specifically by the university for the project.

The final day of training took place at the court where students were able to familiarise themselves with the court environment and make experiential observations of FHDRA and the work of the PSU. Students were required to successfully complete all aspects of the training before starting work. They worked in pairs to provide services for litigants who presented at court without a lawyer and who were referred to the service by the PSU.

In Practice

Students provided information to LIPs about the purpose of the FHDRA and the main aspects of Family Procedure Rules 2010 Practice Direction 12B. Using mini iPads and a standardised template, students were able to assist the LIP to check for domestic abuse and to help the LIP think about agreed issues and those remaining in dispute. The template facilitated the creation of a typed note to set out key points such as a chronology, domestic abuse, willingness to mediation or to attend a Separated Parents Information Programme, or the need for a translator. It was also used to set out a summary of issues, those agreed and those remaining in dispute. The LIP was then invited to review the document and could choose whether to amend it and whether to make it available to the court and the other party to the case. If so, the document was then reviewed by the supervisor, and sometimes revised in discussion with the students, before copies were printed and made available to the LIP for final approval. The vast majority of LIPs who were seen by the project chose to provide a note to the court.

Preparation of the note was at times challenging, especially where there was a limited period of time before the parties were called in to court. The court is an alien environment for LIPs and they often presented in a heightened state of anxiety. English was often their second language. Domestic abuse was a re-occurring concern. The students worked hard to meet an array of needs, sometimes tackling complex ethical issues. On one occasion two female volunteers referred to the supervisor and examined their own ethical position and personal safety before deciding to continue to work with a LIP who was convicted rapist.

Additionally, students provided a limited in-court McKenzie Friend service, sometimes providing a copy of the litigant's note for the hearing to the other party or their lawyer if they had one, but never making any representations on behalf of or providing legal advice to the LIP. If the LIP opted for additional support, students accompanied them in to court and sat by

them for the duration of the hearing to offer moral support and to take a note of the outcome. Once the hearing was completed, students met with the litigant to consider the outcome and provide a typed summary of key dates and immediate action arising from the court's order. It was observed that this was the most difficult point for LIPs who were often confused as to what the court had decided and ordered. The initial weeks revealed that the consideration of dispute resolution by the court sometimes confused LIPs and students alike. It was not always clear as to what had been ordered by the court and what were expressions of what might eventually be a desired outcome for the case. After further reflection, the project procedure was revised to enable students to speak only at the conclusion of the hearing, to check with the judge or legal advisor that they had correctly noted the court's order. Students also provided signposting to other services and organisations, with 10% of LIPs being referred to Legal Aid franchised solicitors where the LIP was likely to be eligible for public funding.

The student team assisted litigants in person at court on Wednesday of each week, each weekly team consisting of four students, the work being shared on a rota across nine student volunteers. They worked with litigants in public areas of the court on the fourth floor and at any time could access support from the supervisor who remained in the dedicated room. On a few occasions, students worked with the LIP in the dedicated room where the LIP appeared to be vulnerable. Students worked in pairs so that they could peer review one another's work and to ensure that the work was undertaken safely. Between December 2016 and February 2017, approximately 30 feedback questionnaires were completed and returned by LIPs. All provided positive feedback. One litigant felt that the volunteers should not have assisted the opponent in his case who also attended court without a lawyer and was seen by a separate team of students on the project.

HMCTS management reported that the service was successful and appreciated by judges and magistrates who had conduct of

FHDRA's. But the Personal Support Unit was not able support the continuation of the project beyond the initial pilot period. The project had placed the PSU under an additional administrative burden. The provision of a McKenzie Friend service by two organisations in one court was reported by the PSU to have caused confusion for the public and court staff and so the project did not progress beyond the duration of the pilot project.

Developing a family court LIP service for the future

Experience of the LSBU pilot in 2017 suggests that a plural and diverse approach should be pursued. There are good reasons why a LIP service might be based both at and also away from the court environment. Offering a service to LIPs at court is essential as it offers immediate help at the point where it is required. Offering a LIP service away from the court offers a different advantage. It enables the service to provide an intervention before the court hearing. This has some benefits, particularly if it works to support the work of the PSU and other court-based services. It offers an opportunity to prepare a note for the hearing at which the LIP must later attend. It allows the LIP to reflect upon his/her situation away from the often alien environment of the court and the anxiety that that often brings. This provides the LIP with time and opportunity to reflect upon the information that they have received and the document that has been prepared for them and which they might revise and eventually use at court. A service based away from the court also provides an opportunity to provide LIPs who might otherwise struggle with access to the technology and with the process of on-line

applications. HMCTS has already successfully piloted an on-line divorce application system and further developments are planned for on-line applications for children and also financial applications.

The use of technology will offer greater opportunities to widen access to justice for increasing numbers. The Law Division at LSBU is committed to the teaching of law and technology. From February 2019, students from the Law Division and from Computer Science and Engineering will sit in classes together to study the application of technology and law. On a practical level, and using existing technology, one very achievable first step to be considered should be the provision of legal advice provided by lawyers at distance for litigants in attendance at the university's Family Court LIP service. This could be achieved using already available and accessible technology such as FaceTime or Skype. In the not-too-distant future, a more ambitious project might be the designing and building of a chatbot to automate the preparation of the note for the court at a FHDRA.

Undergraduate students are no replacement for the provision of legal advice and representation by qualified and skilled lawyers, but, with targeted training and education, and under appropriate supervision or mentoring, they have the potential to offer a valuable resource to the support of LIPs in the family court. For so many, they will be the only option. Meanwhile, LIPs, students and other volunteers, practitioners, court staff and judges await to hear from the government, which said it was committed to completing a post implementation review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 by the end of 2018.